No. 75-1512

Supreme Court of the United States

October Term, 1975

LARRY FRIERSON, ET AL.,,

Petitioners,

v.

JOHN C. WEST, Governor of South Carolina; ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie Street
Atlanta, Georgia 30303

MELVIN WULF
22 East 40th Street
New York, New York 10016

RAY McCLAIN
P.O. Box 608
Charleston, S.C. 29402

HERBERT E. BUHL, III
2016 1/2 Green Street
Columbia, S.C. 29205

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.

Counsel for Petitioners

INDEX

	Page
Opinions Below.	2
Jurisdiction.	2
Questions Presented	2
Statement of the Case	4
Reasons for Granting the Writ . .	14
Conclusion.	21

Appendix

Order of the United States Court of Appeals for the Fourth Circuit.	1a
Order of the District Court of the United States for the District of South Carolina, Florence Division	3a
Order of the District Court of the United States for the District of South Carolina, Florence Division	8a
Code of Laws of South Carolina, 1962, as amended	31a
Code of Laws (Ordinances) of the Town of Bishopville, South Carolina	33a

TABLE OF CITATIONS

Cases: Page

Anderson v. Nemetz,
474 F.2d 814 (9th Cir. 1973).....18, 19
Argersinger v. Hamlin,
407 U.S. 25 (1972).....14
Bruton v. United States,
391 U.S. 123 (1968).....16
Decker v. Fillis,
306 F.Supp. 613 (D. Utah 1969)...18, 19
Doe v. Bolton,
410 U.S. 179 (1973).....17
Estes v. State of Texas,
381 U.S. 532 (1965).....15
Foman v. Davis,
371 U.S. 178 (1962).....20
Glasser v. United States,
315 U.S. 60 (1942).....16
Gooding v. Wilson,
405 U.S. 518 (1972).....18
Hamilton v. Alabama,
368 U.S. 52 (1961).....16
Haynes v. Washington,
373 U.S. 503 (1963).....16
Henderson v. United States,
339 U.S. 816, 70 S.Ct. 843,
94 L.Ed. 1302.....20
Jackson v. Denno,
378 U.S. 368 (1964).....14
Lee v. Washington,
390 U.S. 333 (1967).....20
Lewis v. City of New Orleans,
415 U.S. 130 (1974).....18
Moody v. Flowers,
387 U.S. 97 (1967).....21
In re Murchison,
349 U.S. 133 (1955).....15

Page

North v. Russell, No. 74-1409.....14
Offut v. United States,
348 U.S. 11 (1954).....16
Papchristou v. City of Jacksonville,
405 U.S. 156 (1972).....18
Peters v. Kiff,
407 U.S. 493 (1972).....15
Rosado v. Wyman,
397 U.S. 397 (1970).....21
Sheppard v. Maxwell,
384 U.S. 333 (1966).....15
Steffel v. Thompson,
415 U.S. 452 (1974).....17
Thoms v. Heffernan,
473 F.2d 478 (2d Cir. 1973).....19
Town of Conway v. Lee,
209 S.C. 11, 38 SE2d 914 (1946).....13
Tumey v. Ohio,
273 U.S. 510 (1926).....15
Turner v. State of Louisiana,
379 U.S. 466 (1965).....15
Washington v. Lee,
263 F.Supp. 327 (M.D. Ala) aff'd
sub non Lee v. Washington, 390 U.S.
333 (1967).....20
Wulp v. Corcoran,
454 F.2d 826 (1st Cir.) 1972).....18,19
Younger v. Harris,
401 U.S. 37 (1971).....17

Statutes: Page

United States Code

Title 28, Section 1254(1)..... 2

Code of Laws of South Carolina, 1962, as amended

Section 7-104..... 6
Section 16-558.....12
Section 43-63..... 5
Section 43-114..... 6
Section 43-115..... 6
Section 43-131..... 6
Section 43-132..... 6
Section 43-133..... 6
Section 43-134..... 6
Section 43-201..... 6
Section 43-202..... 6
Section 43-211-17..... 6
Section 43-221..... 6
Section 43-222..... 6
Section 43-231..... 6
Section 43-241..... 6

Code of Laws (Ordinances) of the Town of Bishopville, South Carolina

Section 12-1.....13

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1976
No.

LARRY FRIERSON, JIMMIE MACK, WILLIE LEE PETERSON, WILLIAM FRIERSON, BURNELL FRANKLIN and ALFRED BRADLEY, on their own behalf and on behalf of all others similarly situated,

Petitioners,

v.

JOHN C. WEST, Governor of South Carolina; ARCHIE H. CHANDLER, SR., Magistrate of Lee County; R.B. McLENDON, Magistrate of Lee County; LISTON TRUSDALE, Sheriff of Lee County; and O'DELL CORBETT, Chief of Police of Bishopville, S.C., individually, in their official capacities and the successors in the interests of each,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 20, 1976.

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at 1a. The opinions of the District Court are also unreported and appear in the appendix hereto at 3a and 8a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 20, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, who were prosecuted or threatened with prosecution for violations of offenses within the jurisdiction of magistrates (lay judges), have standing to seek declaratory and injunctive relief against future trials?

2. Whether petitioners must show actual harm as an element of standing in a civil suit for affirmative relief against trial before magistrates in criminal cases where such magistrates are not required to have any level of legal knowledge, training or experience and whom the record shows to be incompetent to discharge the duties of their office?

3. Whether petitioners have standing to contest the constitutionality of disorderly conduct and breach of the peace laws where they were actually prosecuted for violations of such laws or were threatened with future prosecutions, and where the laws were not moribund and a prima facie showing

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was made of a pattern and practice of discriminatory enforcement based upon race?

4. Whether, following the convening of a three-judge court, such court properly refused to hear or remand to a single-judge court a claim cognizable by the district court for the reason that other issues raised in the complaint were required to be heard by three judges?

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STATEMENT OF THE CASE

Petitioners are Negro residents of South Carolina. They challenge the constitutionality of (1) trial before magistrates (lay judges) in Lee County in criminal cases which could result in sentences of imprisonment, where such magistrates are not required to possess any level of legal knowledge or training and whom the record shows to be incompetent to discharge the duties of their offices, and (2) certain South Carolina statutes and municipal ordinances relating to disorderly conduct and breach of the peace which are alleged to be vague and overbroad and applied discriminatorily on the basis of race by law enforcement officers in Lee County and the Town of Bishopville, South Carolina.[1]

1. The statutes and ordinances involved are set out in the appendix at 31a. The original complaint was filed as a class action on August 5, 1974, and sought the convening of a three-judge court to hear the attack upon the state statutes. The complaint was amended to add an additional plaintiff on August 9, 1974. On October 28, 1974, and after some discovery had been made, petitioners moved the Court to allow them to amend their complaint to add another plaintiff and to challenge the constitutionality of the municipal ordinances. The motion was denied on November 21, 1974, for the reasons that "the attack upon the Bishopville ordinances is a matter to be tried in [footnote continued to next page]

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The respondents include magistrates of Lee County, South Carolina, who have jurisdiction over minor offenses such as disorderly conduct, breach of the peace and violations of traffic laws,[2] and law enforcement officers of Lee County and the Town of Bishopville, South Carolina, who have the duty of enforcing state and municipal laws, including those relating to disorderly conduct and breach of the peace.

The evidence supporting petitioners' allegation that trial in criminal cases before magistrates is unconstitutional was voluminous and essentially uncontradicted. It may be briefly summarized as follows:

1. No prior training, experience, formal education of any kind and no knowledge of the criminal law, law of evidence, or any other law is required of magistrates

[footnote continued from preceding page] the District Court before a single judge, and not by a three judge Court," while adding an additional plaintiff "would only unduly delay discovery procedures, while adding nothing to the plaintiffs' case." 6a.

2. Magistrates have criminal jurisdiction over "all offenses which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days and may impose any sentence within those limits, singly or in the alternative." Section 43-63, Code of Laws of South Carolina, 1962, as amended. [footnote continued to next page]

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in South Carolina.[3]

2. No satisfactory provisions are made for magistrates on-the-job education after their assumption of office.[4]

[footnote continued from preceding page]

Magistrates have complete criminal authority as other judges from issuing warrants through trial. Sections 43-114, 115, 131, 132, 133, 134, 201, 202, 211-17, 221, 222, 231 and 241, Code of Laws of South Carolina, 1962 as amended.

Appeal from conviction in the magistrates court is not de novo but is upon a return prepared by the magistrate himself. Section 7-104, Code of Laws of South Carolina, 1962, as amended.

3. Of the 328 magistrates in South Carolina as of November 22, 1974, only 16 had formal training in the law and held bar membership.

4. The Department of Judicial Education of the University of South Carolina began in 1971 holding three to four day "schools" for magistrates, but attendance is voluntary and approximately half of the magistrates never attend.

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3. The job of magistrate is part-time and underpaid. For many, it is temporary employment.[5]

4. Because of their lack of training and knowledge, magistrates are grossly ignorant of substantive and procedural provisions of criminal law.[6]

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5. Only 83 magistrates devote full time to their judicial duties. More than half are paid less than $3,000 by the state. As a result there is a substantial annual turnover in the job. Eighty-five new magistrates, for example, assumed office during 1974.

6. Respondent McLendon was unaware of procedures for jury trials; was unaware of the purpose of bail, a defendant's entitlement to it, and the factors to be considered or the procedures in setting bail; did not know what his duties were in connection with appeals from his court, or whether he was required to prepare a record of trial; did not know the circumstances under which an individual is entitled to a preliminary hearing, nor the procedures to be followed in conducting such a hearing; was not familiar with the concept of probable cause and had never refused to issue an arrest or search warrant; was not familiar with the rules of evidence or the concept of judicial notice; had heard of the hearsay rule, but was unaware of the doctrine of exceptions to hearsay such a declarations against interest or the business records rule; was unfamiliar with the concept of impeaching a witness's testimony; stated that a plea of guilty made
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5. Magistrates lack access to legal materials and the ability to use them.[7]

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under the influence of drugs or alcohol could never be withdrawn; was not familiar with the exclusionary rule or whether evidence seized in violation of the fourth amendment must not be allowed into evidence; was not aware of any responsibility he had as a magistrate to determine the voluntariness of a confession before letting it go to a jury; was unaware of the basis of the magistrate's jurisdiction; was not familiar with the concept of statutes being defective because of overbreadth or being void for vagueness; was unfamiliar with the concept of constitutionality and denied that as a magistrate he had the authority to declare a law of the State of South Carolina unconstitutional; and was unfamiliar with the concept of reasonable doubt in connection with trials.

7. The library of a South Carolina magistrate may consist of a set of the Code of Laws of South Carolina and nothing else. Neither of the two magistrates in this case had ever read an opinion of any federal court or state court of South Carolina. One had never even read the Code of Laws of South Carolina.

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6. Because of their lack of understanding of the law and the judicial process, magistrates rely upon non-judicial advice and identify with law enforcement rather than judicial administration.

7. Magistrates, because of the volume of judicial business they handle, have an enormous potential for mischief and error in the administration of criminal law in South Carolina.[8]

The district court held that petitioners lacked standing to contest trial before magistrates for the reasons that no prosecution against them were then pending and they had failed to show "actual harm . . . by any magistrate, nor . . . more than mere speculation . . . of . . . constitutional deprivations in the future." 30a.

Petitioners showed that they had been prosecuted for offenses within the magistrate's jurisdiction as follows: (a) Mack with driving under the influence of alcohol; (b) Franklin with violation of traffic laws and for disorderly conduct;[9] (c) Larry

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8. Approximately 85% of all the criminal justice in the State is administered in the magistrate court and never goes beyond that level. There is, moreover, no right to a de novo trial from conviction in magistrate's court.

9. Franklin was arrested on August 5, 1974, by a municipal policeman and charged with "disorderly conduct." His case was heard before the City Recorder of Bishopville and he was acquitted on the grounds of lack of evidence.

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Frierson with violations of bad check and alcohol laws; (d) William Frierson with violation of traffic laws; and (3) Bradley with violation of traffic laws. Bradley's trial judge was Respondent Chandler.

Petitioners showed further that they had been threatened with prosecution for disorderly conduct and related offenses within the jurisdiction of magistrates. Larry Frierson, Peterson, William Frierson and Mack were stopped by municipal police on April 28, 1974, while driving through the Town of Bishopville. William Frierson was arrested, charged with running a red light, and taken to the jail used jointly by the town and county. The other petitioners proceeded to the jail and parked their car. They were met by county and city officers who told them that unless they left they would be arrested or locked up for being "disorderly" and for "disturbing the peace." Larry Frierson inquired how they could be arrested for disturbing the peace or for being disorderly since their conduct was quiet and orderly. A county officer told them they could also be arrested for "loitering." The three left the jail and returned with Frierson's father who secured his son's release from custody. The evidence is undisputed that none of the petitioners were behaving in a boisterous or loud manner, but on the contrary their behavior was orderly and respectful.

Petitioners also showed a vigorous pattern of enforcement by respondents of the challenged state and municipal disorderly conduct and breach of the peace laws. Respondents' arrest records do not cite specific code provisions but use generic terms such as "drunk and disorderly" and "breach of the peace" to indicate the offenses charged. Prior to the filing of the complaint county officers brought during 1974 at least 23 charges of "disorderly conduct" or "drunk and disorderly" and at least 10 charges of "drunk," "public drunk," or some similar charge before the magistrates in Lee County. From January 5, 1970, until the filing of the complaint municipal officers brought at least 273 charges of "disorderly conduct," or "drunk and disorderly," one charge of "disorderly conduct - breach of the peace," two charges of "drunk and breach of the peace," 107 charges of "drunk," 447 charges of "public drunkenness," and 156 charges of "public drunk."

After the filing of the complaint, respondents continued to prosecute for disorderly conduct and related crimes. From August 16, 1974, to October 31, 1974, county officers brought at least 10 charges of "disorderly conduct" or "drunk and disorderly" and at least 37 charges of "drunk," "public drunk," or some similar charge before the magistrates in Lee County. During the same period of time, municipal officers brought at least six charges of "disorderly conduct" or "drunk and disorderly," and at least 36 charges of "drunk."

The district court deferred discovery as to petitioners' claim that the challenged laws were being discriminatorily applied for the reason that if such laws were facially unconstitutional the issue of unconstitutional application would not have to be reached. The municipal defendants admitted in their answer, however, that from January 1, 1973, through December 31, 1974, of 51 persons arrested for disorderly conduct, 46 were black. They accounted for the disproportionate arrests by reason of the presence in Bishopville of businesses "where the playing of music by way of music machines and the selling of beer and sandwiches after sundown is actively carried on, which are owned and predominately frequented by blacks."

The district court dismissed the challenge to the state statutes on the grounds that petitioners had not shown that they had been prosecuted or threatened with prosecution for violations of the statutes and had failed to show that the threat of future prosecution was "real and immediate." 22a. The record shows, however, that petitioner Franklin was tried for "disorderly conduct," an offense under §16-558, Code of Laws of South Carolina, 1962, as amended, and the challenged laws were not moribund.[10]

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10. Franklin was tried before a City Recorder, but there is no "disorderly conduct" ordinance of the Town of Bishopville. That crime is an offense only under §16-558. Moreover, the stated practice in the Recorder's Court is to try persons under both state statutes and city ordinances which are believed relevant "with reference to both [footnote continued to next page]

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The opinion of the three-judge district court dismissing the complaint was affirmed summarily by the court of appeals by Order of January 20, 1976.

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codes" (i.e., the Town Code and the Code of Laws of South Carolina). Furthermore, §12-1 of the Town Code adopts all of the criminal statutes in the Code of Laws of South Carolina insofar as they can have application in the Town of Bishopville, this despite a state superior court decision that would render this contrary to state law. Town of Conway v. Lee, 209 S.C. 11, 38 S.E.2d 914 (1946). Included in the statutes so adopted are those relating to disorderly conduct and breach of the peace. According to the City Recorder, "no conscious distinction is made between whether the cases [i.e., disorderly conduct and breach of the peace] are heard under Section 12-1, which incorporated the criminal statutes of the State of South Carolina, or whether they are under Section 12-6, 12-7, 12-12 or 12-13 of the Code of Laws (Ordinances) of the Town of Bishopville."

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REASONS FOR GRANTING THE WRIT

I. IMPORTANT SIMILAR ISSUES ARE ALREADY PENDING BEFORE THE COURT.

Certiorari should be granted because this petition presents a question that is identical with, or similar to, an issue pending before the Court in another case in which review has been granted, North v. Russell, No. 74-1409, involving the constitutionality of trial before lay judges. Decisions of this Court, including Argersinger v. Hamlin, 407 U.S. 25 (1972), extending the right of counsel to all persons exposed to sentences of confinement, Shadwick v. City of Tampa, 407 U.S. 345 (1972), concluding that judicial officers must be capable of resolving legal issues, Jackson v. Denno, 378 U.S. 368 (1964), recognizing that lay persons are unable to make certain decisions involving the application of constitutional principles, and the grant of review in North, demonstrate the fundamental importance of the issue of lay judges presented in this petition.

While the underlying issue in North and this case involving lay judges is identical, the cases differ in that North is an appeal from a criminal conviction while this case is a civil action seeking direct review in the district court of the disputed state court practice. Certiorari should be granted here to determine the additional important

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issue of whether such a challenge can be raised in a civil suit for affirmative relief, or whether review is limited to appeal from a criminal conviction.

II. THE COURT BELOW MISAPPLIED DECISIONS OF THIS COURT IN DISMISSING THE COMPLAINT FOR LACK OF STANDING.

The court below misapplied decisions of this Court in applying a standard of actual harm in determining standing to raise the lay judge issue. This Court has long held that where a fundamental right of an accused is involved, it is neither necessary nor possible to trace actual prejudice after the fact; rather, a system which creates a reasonable possibility of error itself works a denial of due process.

The rule of inherent prejudice was used in striking down the practice of televised criminal trials as unfair, even though "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." Estes v. State of Texas, 381 U.S. 532, 544 (1965). The rule was applied to invalidate state procedure in In re Murchison, 349 U.S. 133, 136 (1955) (judge combines functions by indicting and trying defendant); Sheppard v. Maxwell, 384 U.S. 333, 352 (1966) (pre-trial publicity); Turner v. State of Louisiana, 379 U.S. 466, 473 (1965) (use of deputy sheriffs as jury custodians); Tumey v. Ohio, 273 U.S. 510, 532 (1926) (system compensating judge from fines imposed on litigants); Peters v. Kiff, 407 U.S. 493 (1972) (exclusion of blacks from juries).

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This per se rule of unconstitutionality has also been applied to the right to assistance of counsel,[11] the right to have a trial free of the introduction of a coerced confession regardless of other evidence of guilt,[12] and the right to have a co-defendant's confession kept from the jury despite the use of a limiting instruction.[13]

The evidence in this case of the reasonable possibility of error in trials before lay judges is overwhelming. The standard of possible rather than actual harm is grounded in other considerations as well: if the promise of a fair trial to all litigants is to be fulfilled, then "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).

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11. Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from the denial."); Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("[W]e do not stop to determine whether prejudice resulted ... [T]he degree of prejudice can never be known.")

12. Haynes v. Washington, 373 U.S. 503 (1963); Jackson v. Denno, 378 U.S. 368 (1964).

13. Bruton v. United States, 391 U.S. 123 (1968).

The court below held that petitioners lacked standing for the additional reason that no prosecutions before magistrates were pending against them at the time of the filing of the complaint. Had charges been pending, the court surely would have concluded that Younger v. Harris, 401 U.S. 37 (1971) was a bar to federal intervention. Thus, the lower court "turn[ed] federalism on its head." Steffel v. Thompson, 415 U.S. 452, 472 (1974).

Steffel v. Thompson concluded that standing was established by the threat of petitioner's arrest, corroborated by the actual arrest of another. These conditions are present here. Petitioners have been prosecuted for offenses within the jurisdiction of magistrates, have been threatened with imminent arrest and future prosecutions for offenses within the jurisdiction of magistrates and have shown a continuing pattern and practice of prosecution of such offenses. Also see, Doe v. Bolton, 410 U.S. 179, 188 (1973), where seven physicians were held to have standing to challenge Georgia's anti-abortion statute, although none of them had been actually threatened with prosecution under the statute, because (1) the statute could be applied to them if they procured certain abortions; and (2) the statute was not moribund, as prosecutions had occurred under the predecessor statute.[14]

14. Rizzo v. Goode, ___ U.S. ___ (1976), 44 LW 4095, is inapposite. It involved speculation as to what "a small, unnamed minority [footnote continued to next page]

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS.

The lower court's conclusion that petitioners lacked standing to contest trial before lay judges and the constitutionality of disorderly conduct and breach of the peace laws is in conflict with decisions of other circuit and district courts, e.g. Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972), Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973), and Decker v. Fillis, 306 F.Supp. 613 (D. Utah 1969).

[footnote continued from preceding page]

of policemen might do ... in the future." 44 LW at 4098. Here there is no speculation. Respondents have a continuing and established policy of trying offenses before lay judges, including disorderly conduct and breach of the peace offenses which are patently unconstitutional and are racially discriminatory in their application. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), Gooding v. Wilson, 405 U.S. 518 (1972), and Lewis v. City of New Orleans, 415 U.S. 130 (1974).

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In Wulp v. Corcoran, standing was sustained simply where one plaintiff was threatened with prosecution and others had been limited in their activities under the challenged ordinance. In Anderson v. Nemetz, plaintiff was arrested under a state vagrancy statute. After a prosecution and successful appeals, he was exonerated, and he brought suit (apparently not a class action) to enjoin enforcement of the statute. The Ninth Circuit reversed an order dismissing his complaint and held, on the question of standing:

> Appellant Anderson's fears of prosecution by the state are not "imaginary or speculative." He has already been arrested once, and has endured four rounds of trial and appeals. The declared intention of the state to continue to enforce the statute against him coupled with 384 arrests over a three-year period in Scottsdale alone, provide a realistic basis for fear of prosecution, and serve to establish the "acute, live controversy" required for standing. 474 F.2d at 818.

Decker v. Fillis presented a similar set of facts regarding the vagrancy ordinance of Sale Lake City, and the result was identical to Anderson.[15]

15. Thoms v. Heffernan, 473 F.2d 478, (2d Cir. 1973), rev'd. 418 U.S. 908 (1974), further supports the importance of the standing issue involved in this case.

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Also see, Washington v. Lee, 263 F.Supp. 327, 329-30 (M.D. Ala.), aff'd sub non. Lee v. Washington, 390 U.S. 333 (1967), where the court concluded that past use of segregated penal facilities gave plaintiffs standing to challenge the constitutionality of Alabama statutes requiring racial segregation in prisons and jails.

> [T]his Court does not conceive that it is necessary that plaintiffs show an intention to violate the laws. . . in such a manner that would subject one or more of them in the future to imprisonment in these locations . . . all that it is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices . . . is that the operation of these institutions, as that operation presently exists, "permit[s] the recurrence of comparable violations." Henderson v. United States, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302.

IV. THE LOWER COURT ERRED IN DISMISSING THE SINGLE JUDGE COURT ISSUE.

The lower court abused its discretion in denying the motion to amend to attack the constitutionality of the town ordinances and to add petitioner Bradley as a plaintiff. Foman v. Davis, 371 U.S. 178 (1962). Especially

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was the denial unfair since the failure to attack the ordinances was one of the cited grounds for dismissing respondent Corbett as a defendant. Even assuming that the lawfulness of the ordinances was not a proper subject for a three-judge court because of their local application, Moody v. Flowers, 387 U.S. 97 (1967), the proper procedure is not dismissal of the claim, but reference of it to a single-judge district court. The presence of three-judge court claims surely cannot work to restrict the jurisdiction of the district court to hear single judge issues which are conceded to be within the power of the court to adjudicate. See Rosado v. Wyman, 397 U.S. 397, 402 (1970).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie St., N.W.
Atlanta, Georgia 30303

MELVIN WULF
22 East 40th Street
New York, New York 10016

RAY McCLAIN
P.O. Box 608
Charleston, S.C. 29402

POOR COPY

HERBERT E. BUHL, III
2016 1/2 Green Street
Columbia, S.C. 29205

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.

Counsel for Petitioners

[Filed January 20, 1976]
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1799

LARRY FRIERSON, JIMMIE MACK, WILLIE LEE PETERSON, WILLIAM FRIERSON, BURNELL FRANKLIN and ALFRED BRADLEY, on their own behalf and on behalf of all others similarly situated,

Appellants,

versus

JOHN C. WEST, Governor of South Carolina; ARCHIE H. CHANDLER, SR., Magistrate of Lee County; R.B. McLENDON, Magistrate of Lee County; LISTON TRUSDALE, Sheriff of Lee County; and O'DELL CORBETT, Chief of Police of Bishopville, S.C. individually, in their official capacities and the successors in the interests of each,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Florence. Three-Judge Panel: Donald Russell, Circuit Judge, and Charles E. Simons, Jr., and Robert F. Chapman, District Judges.

O R D E R

The district court of three judges dismissed this action upon the ground that the plaintiffs failed to satisfy the threshold requirement that an actual case or controversy existed. The plaintiffs have appealed the dismissal of their action, and the defendants have now moved for summary affirmance.

Upon consideration of the motion, we agree with the conclusion of the district court, and it is ORDERED that the defendants' motion for summary affirmance is granted and the judgment of the district court is affirmed.

s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

s/ H.E. Widener, Jr.
United States Circuit Judge

s/ John A. Field, Jr.
United States Circuit Judge

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[Filed November 21, 1974]
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION
Civil Action No. 74-1074

LARRY FRIERSON, JIMMIE MACK, WILLIE LEE PETERSON and WILLIAM FRIERSON, on their own behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
-versus-	)	O R D E R
JOHN C. WEST, Governor of South Carolina; ARCHIE H. CHANDLER, SR., Magistrate of Lee County; R.B. McLENDON, Magistrate of Lee County; LISTON TRUESDALE, Sheriff of Lee County; and O'DELL CORBETT, Chief of Police of Bishopville, South Carolina; individually and in the official capacities and the successors in the interests of each,	)	
Defendants.	)	

This matter is now before the court on plaintiffs' motion to amend the complaint and add party-plaintiff. The original complaint was filed with this court August 5, 1974, and pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, an amended

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complaint was subsequently filed on September 13, 1974.

This class action seeks a declaratory judgment declaring Sections 16-558, 43-64, 43-214, and 43-215, Code of Laws of South Carolina for 1962, as amended, to be in violation of the First, Sixth, Thirteenth, and Fourteenth Amendments of the Constitution of the United States, and seeks injunctive relief enjoining the defendants, their agents, officers, servants, employees, and successors in office from arresting or prosecuting, or threatening to arrest or prosecute, the plaintiffs and their class for violations of said Statutes, or otherwise enforcing such Statutes, and further from requiring plaintiffs and their class to have their cases tried before Magistrates who are not required to possess any legal training or have any level of legal knowledge or experience.

Pursuant to Title 28, Section 2282, United States Code, on September 25, 1974, the Chief Judge of the Fourth Judicial Circuit, designated a three-judge court composed of the Honorable Donald Russell, United States Circuit Judge, Fourth Judicial Circuit, The Honorable Robert F. Chapman, United States District Judge for the District of South Carolina, and the undersigned, to hear the above entitled action as provided by Title 28, Section 2284, United States Code.

Plaintiffs have now moved the court for leave to amend their complaint to allege that provisions of the Code of Laws (ordinances) of the Town of Bishopville, are

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unconstitutional, and further, to add Alfred Bradley as a party-plaintiff. The motion is denied.

The law is well settled that the constitutionality of a local statute or ordinance is not a proper question for a three-judge court. Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967). In speaking of three-judge courts, the United States Supreme Court has recently stated:

> "Such a court is required where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy. But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. . . . Thus, the 'term "statute" in Section 2281 does not encompass local ordinances or resolutions,'. . . nor does it include a state statute having only a local impact, even if administered by a state official." Board of Regents v. New Left Education Project, 404 U.S. 541 at 542-543, 92 S.Ct. 652 at 653-654, 30 L.Ed.2d 697 at 700 (1972).[1]

1. See also, Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. denied, 94 S.Ct. 2403 (May 13, 1974).

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The undersigned has conferred with the other two members of the designated three-judge panel and they concur that the attack upon the Bishopville ordinances is a matter to be tried in the District Court before a single judge, and not by a three-judge court, as is the plaintiffs' instant attack upon state statutes.

As to adding a party-plaintiff at this stage of the proceeding, the court is of the opinion that this would only unduly delay discovery procedures, while adding nothing to the plaintiffs' case. The plaintiffs' case is self-styled as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, thereby assuring that any relief granted to the plaintiff will accrue to the benefit of Alfred Bradley, and others similarly situated.

A conference with counsel for the parties was held in Columbia, South Carolina, on October 2, 1974. At that time, Wednesday, November 20, 1974, was set as the date by which all discovery as to plaintiffs' first cause of action must be completed, and all briefs and proposed findings of fact and conclusions as to the issue of standing must be filed with the court. To allow plaintiffs to bring in an additional party-plaintiff at this late date, would serve no useful purpose, and would only delay the time framework already agreed to by the parties.

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Therefore, for the reasons given above, plaintiffs' motion to amend complaint and add party-plaintiff is denied.

AND IT IS SO ORDERED.

s/ Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Aiken, S.C.

November 20, 1974

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[Filed May 15, 1975]
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Civil Action No. 74-1074

LARRY FRIERSON, JIMMIE MACK, WILLIE LEE PETERSON, WILLIAM FRIERSON and BURNELL FRANKLIN, on their own behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
-versus-	)	O R D E R
JOHN C. WEST, Governor of South Carolina; ARCHIE H. CHANDLER, SR., Magistrate of Lee County; R.B. McLENDON, Magistrate of Lee County; LISTON TRUESDALE, Sheriff of Lee County; and O'DELL CORBETT, Chief of Police of Bishopville, South Carolina; individually, in their official capacities and the successors in the interests of each,	)	
Defendants.	)	

This action was commenced by the filing of a complaint on August 5, 1974, by the

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plaintiffs, Larry Frierson, Jimmie Mack, Willie Lee Peterson, and William Frierson, each of whom is a black male residing in the Town of Bishopville, South Carolina.

The complaint was subsequently amended on August 9, 1974, when Burnell Franklin, a black male who resides in Camden, South Carolina, was added as plaintiff.

The complaint sets forth three causes of action against the defendants, John C. West, Governor of the State of South Carolina,[1] Archie H. Chandler, Sr., and R.B. McLendon, Magistrates of Lee County, South Carolina, Liston Truesdale, Sheriff of Lee County, and O'Dell Corbett, Chief of Police of the Town of Bishopville, South Carolina. The first cause of action alleges that Sections 16-588, 43-64, 43-214 and 43-215 of the Code of Laws of South Carolina, 1962,

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1. Subsequent to the filing of the complaint in this action, the Office of Governor has been assumed by the Honorable James B. Edwards.

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as amended,[2] are vague and over-broad, in that said sections fail to give adequate notice of proscribed conduct, and thereby encourage arbitrary and erratic arrests and convictions in violation of plaintiffs' rights and those of their class secured by the First, Sixth and Fourteenth Amendments of the Constitution of the United States.

Plaintiffs' second cause of action alleges that the above cited sections of the South Carolina Code have been discriminatorily applied to the plaintiffs and their class because of their race in violation of the Sixth, Thirteenth and Fourteenth Amendments of the Constitution of the United States.

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2. Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be fined not more than [footnote continued to next page]

For a third cause of action, plaintiffs allege that requiring defendants in magistrate's court to have cases tried before judicial officers who are not required to possess legal training or have any level of legal knowledge or experience is arbitrary and irrational and deprives plaintiffs and their class of minimum standards of due process, equal protection and the right to the effective assistance of counsel, all in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States. Plaintiffs' prayer for relief asks that a three-judge court be convened, plaintiffs declared adequate representatives of their class and the class action allowed to proceed, that the court grant

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one hundred dollars or be imprisoned for not more than thirty days. Section 16-558, Code of Laws of South Carolina, 1962 (Cumulative Supplement).

Magistrates may punish by fine not exceeding one hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days all assaults and batteries and other breaches of the peace when the offense is not of a high and aggravated nature, requiring, in their judgment, greater punishment. Section 43-64, Code of Laws of South Carolina, 1962.

Any magistrate shall command all persons who, in his view, may be engaged in riotous or disorderly conduct to the disturbance of the peace, to desist therefrom and shall arrest any such person who shall refuse obedience

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declaratory and permanent injunctive relief, and tax defendants with the costs of this proceeding including attorneys' fees. Defendants all answered by way of general denial.

On September 25, 1974, the Chief Judge of the Fourth Judicial Circuit designated a three-judge court composed of the undersigned to hear this action as provided by Title 28, Section 2284, United States Code.

All defendants moved for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure on the ground that the pleadings, interrogatories, and affidavits made part of the record entitled the defendants

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to his command and commit to jail any such person who shall fail to enter into sufficient recognizance either to keep the peace or to answer to an indictment, as the magistrate may determine. Section 43-214, Code of Laws of South Carolina, 1962.

Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in Section 43-64 or,
[footnote continued to next page]

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to judgment as a matter of law. In addition, defendants Chandler and McLendon have asserted the defense of judicial immunity, and defendant Corbett has filed a separate "Motion to Dismiss" on the grounds that there is no genuine issue for trial, and the pleadings do not state a cause of action against him.

While the plaintiffs correctly urge that the doctrine of judicial immunity should not preclude injunctive or declaratory relief in the instant action, Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973), Wood v. Vaughan, 321 F.2d 480 (4th Cir. 1963), the court is of the opinion that the pleadings, considered in light of interrogatories, affidavits and stipulations of the parties, do not state a cause of action against the defendant Corbett.

Corbett, in his affidavit, states that he has served on the police force of Bishopville, South Carolina, for approximately eleven (11) years, being Chief of Police for the past year. He further states that all cases made by him and his deputies are heard

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when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions. Section 43-215, Code of Laws of South Carolina, 1962.

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in the Town Recorder's court before the City Recorder, W. P. Baskin, III, an attorney. Rarely, when the City Recorder is out of town, Corbett states a case may be made before Magistrate Cothran, who is also an attorney.

Baskins' affidavit states that the Town of Bishopville adopted a Code of Laws on April 11, 1959, which contains Chapter 12 entitled "Miscellaneous Offenses". That chapter contains a number of sections including Section 12-1 which purports to adopt all of the criminal statutes of the State of South Carolina. Chapter 12 of the Bishopville Code also sets forth additional sections such as: Section 12-6, Disturbing the Peace; Section 12-7, Fighting; Section 12-12, Offensive Language; Section 12-13, Public Drunkenness; Influence of Narcotics, etc. Baskins' affidavit further states:

> That the Town of Bishopville apparently has, by virtue of Section 12-1, incorporated verbatim the criminal code of laws of the State of South Carolina, insofar as such statutes can have application within the Town of Bishopville. That cases involving disorderly conduct and related offenses are heard under the provisions of said Chapter 12 of the Town Code, although citations are occasionally made with reference to both Codes.
>
> That in hearing cases for disorderly conduct in related offenses,

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> no conscious distinction is made between whether the cases are heard under Section 12-1, which incorporated the criminal statues of the State of South Carolina, or whether they are under Section 12-6, 12-7, 12-12 or 12-13 of the Code of Laws (Ordinances) of the Town of Bishopville.

Plaintiff urges that this lack of distinction by the Town Recorder creates the inference that defendants charged with disorderly conduct or breach of the peace in Bishopville are often prosecuted for violations of applicable provisions of the Code of Laws of South Carolina by virtue of Section 12-1 of the Town Code which purports to adopt all of the South Carolina criminal statutes. The court does not agree. Not only is the validity of Section 12-1 of the Town Code of Bishopville questionable (see footnote 4, infra), the remaining provisions of Chapter 12 of that Code encompass the criminal offenses proscribed by the challenged state statutes. Plaintiffs have failed to show that the defendant Corbett has brought or threatened to bring any charges against the plaintiffs under the challenged State statutes. Plaintiffs have further failed to establish that the defendant Corbett has ever prosecuted or threatened to prosecute any of the plaintiffs or their class before a magistrate without legal training. Even were the plaintiffs successful in showing the contrary to be true, and the relief sought in the instant action was granted,

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the defendant Corbett would not be precluded from continuing to prosecute cases under the Bishopville Town Code before the Town Recorder.

This is not to say that Corbett would not be a proper party in a suit challenging the constitutionality of those provisions of the Town Code of Bishopville; however, the constitutionality of local statutes or ordinances is not a proper question for a three-judge court. Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967). It thus appearing to the court that there is no genuine issue as to any material fact, the defendant, Odell Corbett, is granted judgment as a matter of law.

On January 22, 1975, the three-judge court was convened in Columbia, S.C., to hear the parties on the issue of standing. After hearing oral arguments by counsel for the parties, and considering their respective briefs and pleadings, the court concludes that plaintiffs do not have standing to maintain any of their causes of action for the reasons set forth below.

The factual basis for plaintiffs' alleged causes of action are set forth in the various affidavits made part of the record. The affidavits of Larry Frierson, William Frierson, and Jimmie Mack claim that on April 28, 1974, more than three months prior to the institution of this action, they, together with Willie Lee Peterson, were stopped by two Bishopville policemen while the four of them

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were riding through the Town of Bishopville in an automobile driven by William Frierson. The latter was charged with running a red light and taken to the County Jail by police officers. Mack, Peterson, and Larry Frierson followed William Frierson and the officers to the jail. At this point they allege that they were met by police officers at the door, one of whom was a deputy sheriff and the other a municipal policeman. The three maintain that they were asked by the officers what they wanted at the jail and they responded that they had come to determine the status of William Frierson. Mack, in his affidavit, states that they were told by the officers that if the three of them did not leave, they would be arrested for "being disorderly" or for "loitering". Larry Frierson, however, says that the police officers threatened to lock the three of them up for "disturbing the peace", and that Deputy Sheriff Ray Mackens told them that they could also be arrested for "loitering" if they did not leave. William Frierson, who was in custody, states only that his three companions were told by police officers at the jail that they would be charged with "disturbing the peace".[3]

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3. None of the challenged State Code Sections creates the offense of "disturbing the peace". That offense is of municipal origin and is set forth in Section 12-6 of the Town Code of Bishopville:

> Disturbing the Peace. It shall be unlawful for any person to engage
> [footnote continued to next page]

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Burnell Franklin, who was added as a plaintiff by the amended complaint of August 8, 1974, states in his affidavit that he was arrested in the Town of Bishopville by a town policeman and charged with driving under the influence on August 5, 1974, the date the original complaint in this case was filed. A breathalizer examination showed that Franklin was not driving under the influence, at which point he was charged, he alleges, by the arresting officer with "being disorderly". He was subsequently brought to trial in the Recorder's Court of the Town of Bishopville

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> in any malicious mischief or boisterous, tumultuous, disorderly, indecent, immoral or riotous conduct of any kind, or do any act or thing which tends to create any disturbance within the limits of the Town, or which might disturb the peace, good order, quiet or tranquility of said Town. Town Code of Bishopville, South Carolina. Section 12-6.

The Court further notes that there is no state law proscribing "loitering". Thus, the events of April 28, 1974, may be more aptly characterized as a threat to prosecute the three plaintiffs for violating Section 12-6 of the Bishopville Town Code.

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on an unspecified date, and was acquitted.[4]

While plaintiffs in their affidavits refer to the offense of disorderly conduct, which in South Carolina is not a common law crime but an offense proscribed either by statute or by ordinance,[5] there is no showing that any plaintiff has been arrested or threatened with arrest for breach of the peace, a common law offense.[6]

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4. Although there are no records to prove the fact, the only reasonable inference which can be fairly drawn from Franklin's affidavit is that he also was charged with violating Section 12-6 of the Town Code of Bishopville, and not a State statute. The incident which led to his arrest occurred within the Town of Bishopville and he was prosecuted by a municipal police officer in a municipal court.

Although Section 12-1 of the Town Code of Bishopville attempts to adopt all State criminal statutes by general reference, the court assumes that the South Carolina Supreme Court would follow its own precedent and declare such ordinance to be unconstitutional. See, Town of Conway v. Lee, 209 S.C. 11, 38 S.C.2d 914 (1946)

5. See, State v. Hill, 254 S.C. 321, 175 S.E.2d 227 (1970).

6. Plaintiffs do not challenge the South Carolina Supreme Court's definition of breach of the peace:

> In general terms, a breach of the peace is a violation of public order,

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While plaintiffs are attacking statutes which confer jurisdiction upon magistrates to prescribe penalties for those guilty of breach of the peace (Section 43-64), and giving magistrates certain arrest powers (Section 43-214 and 43-215), none of the plaintiffs contends that he has been arrested under warrants issued by either of the defendant magistrates or by any other magistrate acting pursuant to the challenged statutes. In addition, no plaintiff contends that he has been tried for the offense of breach of the peace before the defendant magistrates, or any other magistrate.

Nowhere in their affidavits, answers to interrogatories, or amended complaint, do plaintiffs show that any of them has been threatened with arrest and/or prosecution

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> a disturbance of the public tranquility, by any act or conduct inciting to violence . . ., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential

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for an alleged violation of any of the challenged statutes, or that any of them have in fact been arrested and prosecuted for an alleged violation of any of these statutes.

The plaintiffs have further failed to show that any of them has sustained, or is immediately in danger of sustaining, a direct injury as the result of any of the challenged statutes. Without some evidence that at least one of the plaintiffs has sustained some concrete and irreparable injury due to the operation of any of the statutes under attack, none of the plaintiffs has standing to seek injunctive relief to prevent the operation of those statutes. Such showing of irreparable injury is a traditional prerequisite to injunctive

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element in the offense. . . .

By "peace", as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society. State v. Edwards, 239 S.C. 339, 123 S.E.2d 247, at 249 (1961); see also, State v. Randolph, 239 S.C. 79, 121 S.E.2d 349 (1961).

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relief. Dombrowski v. Pfister, 380 U.S. 479 (1965.

Assuming, arguendo, that plaintiffs could show that they were actually prosecuted, or threatened with arrest and prosecution under Section 16-558, as amended, or any of the other statutes under attack, the plaintiffs still do not offer this court an actual case or controversy. An isolated threat occurring more than three months prior to the filing of the complaint cannot be said to constitute a "real or immediate" injury or a threat of such injury that would warrant the imposition of the severe remedy of injunctive relief by this court. The court further feels that even if plaintiff Franklin had made a showing that he had been prosecuted under one of the challenged statutes and acquitted, he has failed to show that such action resulted in a direct and irreparable injury to him so as to warrant any injunctive action by this court.

Of course, different considerations enter into the court's decision as to declaratory relief. Zwicker v. Koota, 389 U.S. 241 (1967). It is not necessary for the plaintiffs to demonstrate irreparable injury in order to be entitled to declaratory relief. See, Aetna Life Insurance Company v. Hayworth, 300 U.S. 227 (1937). As recently held by the United States Supreme Court in Steffel v. Thompson, 415 U.S. 452, 39 L.Ed.2d 505, 94 S.Ct. 1209 (1974):

> . . .that regardless of whether injunctive relief may be appropriate,

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> federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. 415 U.S. at 475 (Emphasis added).

In Steffel, the plaintiff had twice been warned to stop distributing handbills on the exterior sidewalk of a shopping center. The police had actually shown him the statute that they intended to enforce, and threatened plaintiff with arrest if he failed to heed their warning. Plaintiff's companion continued to distribute handbills and was charged with violating the Georgia criminal trespass law, whereupon plaintiff brought an action for injunctive and declaratory relief in the district court, claiming that the application of the trespass law to him would violate his First and Fourteenth Amendment rights. The district court dismissed the action, finding that "the rudiments of an active controversy between the parties . . . (are) lacking." The Court of Appeals for the Fifth Circuit affirmed, holding that the bad faith harassment test set forth in Younger v. Harris, 401 U.S. 37 (1971), applied to a request for injunctive relief against threatened, as well as pending, state court criminal prosecutions; and that the reasoning of Samuels v. Mackell, 401 U.S. 66 (1971), required the application of the

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same test of bad faith harassment as a prerequisite for declaratory relief with respect to a threatened prosecution.

The Supreme Court, in reversing and remanding the case to the Fifth Circuit, stated that the alleged threats of prosecution, under the facts of the case, were not "imaginary or speculative" and that there was an "actual controversy" under Article III of the Constitution and the Federal Declaratory Judgment Act. The Court held that even if a showing of bad faith has not been made, the milder federal remedy of declaratory relief is not precluded when a prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending.

In the instant case, none of the plaintiffs has shown that there was at the time suit was brought either an imminent threat of arrest for violation of any of the statutes under attack, or an imminent threat of prosecution before either of the two defendant magistrates, or before any other magistrate in South Carolina.[7] The plaintiffs have

7. The court again notes that one of the plaintiffs, Burnell Franklin, a resident of Camden, South Carolina, in Kershaw County, was prosecuted in the Recorder's Court of the Town of Bishopville in Lee County, and was acquitted of a violation charged against him of "being disorderly". Three other plaintiffs claimed that two of them and a companion, in [footnote continued to next page]

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further failed to show that a threat of arrest for the violation of any of the statutes attacked or a threat of prosecution before the defendant magistrates, or any magistrate, is continuing. See, Declaratory Relief Without Pending Prosecution: The Sextet Plus One, 26 Baylor Law Review, 433-439 (Summer, 1974).

No plaintiff has shown that he honestly entertains the subjective belief that he may now or in the future may be arrested and prosecuted under the statutes attacked. Even if this were the case, the insufficiency of such a state of mind as the basis for seeking declaratory relief was pointed out by Justice Stewart in his concurring opinion in Steffel v. Thompson, supra, in which the Chief Justice joined:

> Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law

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a separate incident, were threatened with prosecution for disorderly conduct and for breach of the peace in the Town of Bishopville on April 28, 1974, over three months before they filed their complaint.

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is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in Younger v. Harris, 401 U.S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision. . . ."

See also Boyle v. Landry, 401 U.S. 77, 80-81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute. . . ." Cases where such a "genuine threat" can be demonstrated will, I think, be exceedingly rare. 415 U.S. at 476.

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The plaintiffs in the instant case have merely shown that they think the disputed statutes and criminal trials conducted by lay-magistrates are unconstitutional. The facts of this case clearly show that there is no actual case or controversy between the plaintiffs and the defendants, and thus this case is not one of those rare instances where a plaintiff has demonstrated "a genuine threat of enforcement of a disputed state criminal statute." It is wholly speculative as to whether or not any of the plaintiffs will ever be prosecuted in a magistrate's court for violation of any of the laws being challenged. Therefore, the case is not a proper one for declaratory relief. Golden v. Zwicker, 394 U.S. 103 (1969); cf. Roe v. Wade, 410 U.S. 113 (1973).

Just as the United States Supreme Court held in O'Shea v. Littleton, 414 U.S. 488 (1973), plaintiffs in the instant case have:

> . . .failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. Flast v. Cohen, 392 U.S. 83, 94-101 (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-425 (1969) (opinion of Marshall, J.). Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973).

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(Footnote omitted.) There must be a "personal stake in the outcome" such as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. United States v. SCRAP, 412 U.S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or hypothetical." Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947). Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief based on behalf of himself or

> any other member of the class. (Footnote omitted). 414 U.S. at 493, 494.

The record in this case reveals that none of the plaintiffs has pending against him any criminal action involving sections 15-668, 43-64, 43-213 or 43-215 of the South Carolina Code, as amended. Moreover, there is nothing in the record from which it can be reasonably inferred that any of the plaintiffs has ever been threatened with, or prosecuted under, the statutes specifically challenged. Therefore, for the reasons stated above, the plaintiffs do not have standing to proceed with their first cause of action.

Although the court stayed discovery as to plaintiffs' second cause of action, it logically follows that there plaintiffs do not have standing to challenge the constitutionality of specific statutes, they also do not have standing to assert that these same statutes have been discriminatorily applied to them and their class.

As to plaintiffs' third cause of action, which seeks to challenge the constitutionality of being tried for a criminal offense by a lay-magistrate, plaintiffs have failed to show the requisite case or controversy in order to maintain this cause of action either individually, or as representatives of a class. There has been no showing that any of the plaintiffs is presently confronted with pending criminal prosecutions before any magistrate in South Carolina. Moreover,

there has been no showing of actual harm to any of the plaintiffs by any magistrate, nor have the plaintiffs shown more than mere speculation that any of the plaintiffs will suffer constitutional deprivations at the hands of a lay-magistrate in the future. Where such element of uncertainty exists with reference to whether injury is likely to occur, the court is reluctant" . . . to interfere with the normal operation of state administration of its criminal statutes . . ." O'Shea v. Littleton, supra, at 498, Boyle v. Landry 401 U.S. 77 (1971).

Having determined that plaintiffs lack standing to maintain any of the three causes of action alleged in their amended complaint, the court declines to adjudicate the merits of the plaintiff's claims, and the amended complaint is hereby dismissed.

AND IT IS SO ORDERED.

s/ Donald Russell
United States Circuit Judge

s/ Charles E. Simons, Jr.
United States District Judge

s/ Robert F. Chapman
United States District Judge

Aiken, South Carolina

May 6, 1975.

Code of Laws of South Carolina, 1962, as amended:

§16-558. Public disorderly conduct or shooting, etc. -- Any person who shall (a) be found on any highway or at any public place or public gathering in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

§43-64. Breach of the peace. -- Magistrates may punish by fine not exceeding one hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days all assaults and batteries and other breaches of the peace when the offense is not of a high and aggravated nature requiring, in their judgment, greater punishment.

§43-214. Arrests to preserve the peace. -- Any magistrate shall command all persons who, in his view, may be engaged in riotous or disorderly conduct to the disturbance of the peace, to desist therefrom and shall arrest any such person who

shall fail to enter into sufficient recognizance either to keep the peace or to answer to an indictment, as the magistrate may determine.

§43-215. Arrest of persons threatening breach of peace; trial or binding over. -- Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in §43-64 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.

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Code of Laws (Ordinances) of the Town of Bishopville, South Carolina:

Section 12-1. Adoption of State Criminal Statutes. All of the Criminal Statutes of the State of South Carolina now in force and contained in the 1952 South Carolina Code of Laws, as amended, insofar as such Statutes can have application within the Town of Bishopville, are hereby adopted and made a part of this Chapter as though fully set out herein.

Section 12-6. Disturbing the Peace. It shall be unlawful for any persons to engage in any malicious mischief or boisterous, tumultuous, disorderly, indecent, immoral or riotous conduct of any kind, or do any act or thing which tends to create any disturbance within the limits of the Town, or which might disturb the peace, good order, quiet or tranquility of said Town.

Section 12-7. Fighting. It shall be unlawful for any person to engage in, attempt to engage in, aid, abet, counsel or encourage any fight, quarrel, fracus or affray within the limits of the Town.

Section 12-12. Offensive Language. It shall be unlawful for any person to use vulgar, indecent, obscene, profane, blasphemous, offensive, abusive, or quarrelsome language or words in or upon the streets or other public places within the Town, or at any place in said Town where the same may be heard by the public.

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Section 12-13. Public Drunkenness; Influence of Narcotics, etc. It shall be unlawful for any person to appear upon the streets of the Town or any other public place while drunk or under the influence or liquor, opiates or narcotics or any other drug, or while feigning to be drunk, intoxicated, or under the influence of liquor, opiates or narcotics or any other drugs.